UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Bobby Phillips, individually and on behalf of all others similarly situated, Plaintiff,	1:21-cv-06866
- against -	Class Action Complaint
Johnson & Johnson Consumer Inc., Defendant	Jury Trial Demanded

Plaintiff alleges upon information and belief, except for allegations pertaining to plaintiff, which are based on personal knowledge:

1. Johnson & Johnson Consumer Inc. ("defendant") manufactures, labels, markets, and sells herbal mint mouthwash under its Listerine brand represented as "Listerine Naturals" ("Product").

99% NATURALLY DERIVED FORMULA*
FREE OF ARTIFICIAL SWEETENERS & DYES
RE-MINERALIZES WEAKENED ENAMEL FOR BETTER
CAVITY PROTECTION
LISTERINE®
NATURALS
ANTICAVITY FLUORIDE MOUTHWASH
ENAMEL REPAIR
HELPS RESTORE ENAMEL AND KILLS 99.9% OF BAD BREATH GERMS
HERBAL MINT
500mL (1.05 Pt)
30048188

2. The relevant front label claims include "Listerine Naturals," "99% Naturally Derived Formula," and "Free of Artificial Sweeteners & Dyes."

I. CONSUMERS VALUE NATURAL PRODUCTS DESCRIBED

3. Consumers are increasingly conscious of the products they buy, from food to cosmetics and to oral care.

4. Numerous surveys reveal that "natural" – and its variations, i.e., "naturals," "naturally," etc. – is one of the top descriptors consumers consider.

5. Consumers purchase products described as natural based on beliefs they are conducive to and promote health and are made in ways that does not harm the environment.

6. Reasonable consumers understand "natural" and its variations to mean free from synthetic ingredients and ingredients made in non-natural, synthetic methods.

II. PRODUCT'S INGREDIENTS ARE NOT NATURAL

7. The representations are misleading because the Product's ingredients – even if they begin with natural raw materials – undergo significant alterations through non-natural process like chemical reactions and the use of catalysts.

8. The ingredients are separated into "Active" and "Inactive."

Active ingredient

Sodium Fluoride 0.02% (0.01% w/v Fluoride Ion)

Active ingredient
Purpose
Sodium Fluoride 0.02% (0.01% w/v Fluoride Ion)......................Anticavity
Use Aids in the prevention of dental cavities
Warnings
Keep out of reach of children. If more than used for rinsing is accidentally swallowed, get medical help or contact a Poison Control Center right away.
Directions • Adults and children 12 years of age and older: • Use twice a day after brushing your teeth with a toothpaste • Vigorously swish 10 mL (2 teaspoonfuls) of rinse between your teeth for 1 minute and then spit out • Do not swallow the rinse • Do not eat or drink for 30 minutes after rinsing • Supervise children as necessary until capable of using without supervision. • Children under 12 years of age: consult a dentist or a doctor.
Other information • Store at room temperature • Cold weather may temporarily cloud this product
Inactive ingredients Water, Alcohol (21.6% v/v), Sorbitol, Poloxamer 407, Eucalyptol, Methyl Salicylate, Thymol, Stevia Rebaudiana Leaf Extract, Phosphoric Acid, Menthol, Flavor, Disodium Phosphate

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A. Active Ingredients

9. Sodium fluoride, the Product's active ingredient, is a byproduct of the phosphate fertilizer industry.

10. Sodium fluoride is made through reacting hydrofluoric acid with sodium carbonate or sodium hydroxide, and the resulting salt is centrifuged and dried.

11. Sodium fluoride is used for water fluoridation, to treat metal surfaces, etch glass and adjust pH in industrial textile processing.

12. Sodium fluoride is toxic and can severely irritate the skin or eyes.

B. Inactive Ingredients

i. Sorbitol

13. Sorbitol is a naturally occurring sweetener ("sugar alcohol"), found in fruits such as apples and plums.

14. However, the sorbitol in the Product is not from fruits, but from corn starch, subject to hydrolysis and hydrogenation, with chemical catalysts, under high pressure.

ii. Poloxamer 407

15. Poloxamers are nonionic compounds made from synthetic materials and chemical processes.

16. To produce poloxamers, propylene and ethylene oxide are added to propylene glycol in the presence of chemical catalysts, at high temperatures and under high pressure.

17. According to scientific studies and dentists, poloxamer 407 is believed to be highly toxic and linked to breast cancer.

18. Poloxamer 407 is used in mouthwash to blend immiscible liquids.

iii. Methyl Salicylate

19. Methyl salicylate, or wintergreen oil, comes from the wintergreen plant.

20. Presently, methyl salicylate used commercially is produced through synthetic means by esterifying salicylic acid with methanol.

iv. Thymol

21. Thymol is a phenol and found in thyme, oregano, and basil.

22. Thymol can be extracted from these natural sources using aqueous sodium hydroxide and acidification.

23. However, natural thymol typically contains carvacrol, a malodorous substance which

spoils the sweeter, herbal, and medicinal odors of this compound.

24. Almost all thymol is entirely synthetic, produced from the precursor compound meta-cresol, an organic chemical extracted from coal tar.

25. Meta-cresol is mixed with iso-propyl alcohol, resulting in alkylation, forming pure thymol.

v. Stevia Rebaudiana Leaf Extract

26. The use of stevia originates with indigenous Guarani peoples, who use leaves from the Stevia rebaudian plant to sweeten Yerba mate and other foods.

27. Commercial use of stevia focuses on steviol glycosides extracted from the stevia leaf (mainly stevioside and rebaudioside), which is 30 to 150 times sweeter than sugar.

28. Stevia is produced commercially in two ways.

29. In the first method, steviol glycosides are extracted from the stevia leaf and harshly purified through chemical processes, filtered with an ion-ex-change resin to remove salts and ionic molecules.

30. The ion-exchange process and resin remove the color from the aqueous solution.

31. The resin is washed with solvents and re-crystallized from methanol, resulting in highly purified steviol glycosides.

32. The second method involves genetic engineering and synthetic biology which are euphemisms for genetically modified organisms or "GMOs."

33. The result is a substance that mimics the taste of stevia but has no relation to stevia.

34. Regardless of the method used, the claim that the Product is free from artificial sweeteners is misleading because stevia is made through an artificial process.

vi. Phosphoric Acid

35. While phosphatic ores have geological origins in mines, phosphoric acid is a synthetic chemical.

36. To produce phosphoric acid, tricalcium phosphate is converted through reactions with sulphuric acid and calcium sulphate.

37. The calcium sulphate is separated by filtration from the phosphoric acid.

38. The result is an ingredient reasonable consumers would not consider "natural" or naturally derived.

vii. Menthol

39. The two most important commercial sources of menthol are Mentha arvensis (corn mint) and Mentha piperita (peppermint).

40. Natural l-menthol is obtained by freezing essential oil from these plants.

41. The resultant crystals are then separated by filtration.

42. Impurities in the crystals give a slight peppermint aroma to the crystallized l-menthol.

43. The Mint Growers Association of India, the largest producer of natural menthol, says that many oral care products use the synthetic version of menthol.

44. The largest producer of synthetic l-menthol is Symrise, a global flavor company.

viii. Disodium Phosphate

45. Sodium phosphate is a generic term for any sodium salts of phosphoric acid.

46. Sodium phosphate is manufactured by treating phosphoric acid with sodium, such as sodium bicarbonate, and is recognized as synthetic. 7 C.F.R. § 205.605(b).

47. Disodium phosphate is used in oral care products to control acidity.

III. "NATURALS," "99% NATURALLY DERIVED" AND "FREE FROM ARTIFICIAL SWEETENERS" CLAIMS ARE MISLEADING

48. The Product's natural claims are false, deceptive, and misleading.

49. The representations, "LISTERINE NATURALS," "99% naturally derived," and "Free from Artificial Sweeteners," are false, deceptive, and misleading.

50. Reasonable consumers understand the prominent statement of "Listerine Naturals" to mean most or all the ingredients are natural and made through processes which do not involve chemical reactions.

51. No uniform standard or definition exists with respect to cosmetic (and oral care) products.

52. In this gap, various organizations have promulgated criteria under which a product may use terms such as "natural."

53. The International Standards Organization ("ISO") developed a standard entitled, "Guidelines on technical definitions and criteria for natural and organic cosmetic ingredients and products." ISO 16128.

54. This standard has numerous weaknesses and loopholes, which enable its use to mislead consumers.

55. Additionally, consumers cannot even review this standard because it is locked behind paywalls.

56. The publisher does not even allow sharing a purchased copy with the public.

57. The standard's two parts deal with "Definitions for Ingredients" and "Criteria for ingredients and products."[1]

[1] ISO 16128-1 and ISO 16128-2.

A. Inconsistent with Consumer Expectations

58. A reasonable consumer understands a natural product to be one that does not contain man-made, synthetic ingredients, is not subject to harsh chemical processes, and is only minimally processed.

59. Synthetic is defined as of, relating to, or produced by chemical or biochemical synthesis and encompasses substances produced artificially.

60. Consumers understand that cosmetic products do not exist in nature, and raw ingredients must be transformed until they can be combined and eventually sold at stores.

61. Natural processing methods include distillation, fermentation, and extraction.

62. Even where the Product's ingredients may be derived from a natural source, they are subject to processing methods which use chemical catalysts and chemical reactions.

63. ISO 16128 allows processes that are not considered natural and has no limitation on using catalysts or auxiliaries if they are removed from the final product.

64. ISO 16128 has no prohibition against any specific ingredient or class of ingredients.

65. Consumers do not expect products touting their "natural qualities" to contain ingredients derived from petrochemicals, silicone, or GMOs.[2]

B. Ingredients in Product are not Natural

66. According to ISO 16128, a natural ingredient is one obtained from plants, animals, or minerals.

67. However, the standard permits an ingredient to be considered "natural" or "derived natural" if more than 50% of its molecular weight is from a natural source or through a process

[2] Silicone, a silicon-oxygen chain which does not exist in nature, is considered natural under ISO 16128, since it comes from sand and can therefore be of natural origin.

permitted by the standard.

68. Even where the ingredients are from a natural source, they undergo synthetic processes which fundamentally change their nature and/or function, so that they have no relation to the original source material and are considered synthetic.

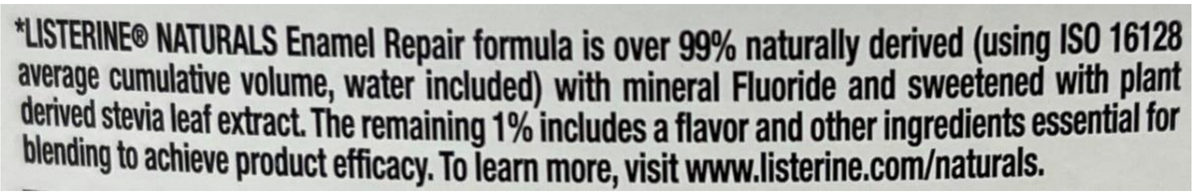
69. ISO 16128 is inconsistent with consumer expectations that do not expect products made with synthetic ingredients and through chemical processes to prominently proclaim they are "natural," "naturally derived" or made with "natural ingredients."

C. "99% Naturally Derived Formula*" is Misleading

70. The front label contains small print – "99% Naturally Derived Formula*" – which purports to qualify the prominent description of the Product as "[Listerine] Naturals."

71. The back label contains a definition from the front label asterisk:

> *LISTERINE NATURALS Enamel Repair formula is over 99% naturally derived (using ISO 16128 average cumulative volume, water included) with mineral Fluoride and sweetened with plant derived stevia leaf extract. The remaining 1% includes a flavor and other ingredients essential for blending to achieve product efficacy. To learn more, visit www.listerine.com/naturals.


*LISTERINE® NATURALS Enamel Repair formula is over 99% naturally derived (using ISO 16128
average cumulative volume, water included) with mineral Fluoride and sweetened with plant
derived stevia leaf extract. The remaining 1% includes a flavor and other ingredients essential for
blending to achieve product efficacy. To learn more, visit www.listerine.com/naturals.

72. This "99%" claim is misleading for several reasons.

73. First, the ISO 16128 standard arrives at a "natural origin index," which appears to be the basis for the 99% claim, based on criteria which are inconsistent with how reasonable consumers understand "natural."

74. The criteria for a product's "natural origin content" is based on "the mass percentage, between 0 % and 100 %, of all natural ingredients and natural portions of derived natural ingredients in that product."[3]

75. This calculation is misleading because it is based upon how this standard defines natural and natural derived ingredients.

76. The ISO 16128 standard is not intended to facilitate the types of natural claims made by the Product.

77. Second, ISO 16128 permits a product to include formulation water in its natural origin content calculation, which is how it arrived at the 99% claim by including.

78. If water was excluded, the percentage – even when using the above-criticized ISO 16128 standard for evaluating ingredients – would be significantly less than 99%.

79. Most independent certification standards for natural products exclude water because its use results in inflating the percent of the total mass of the product which is natural.

80. No reasonable consumer would consider Coca-Cola as a drink containing substantially natural ingredients because it has a high-water content.

IV. CONCLUSION

81. Consumers lack the meaningful ability to test or independently ascertain the truthfulness of labeling claims, especially at the point of sale.

82. Consumers would not know the true nature of the ingredients or final product merely by reading the ingredient label.

83. Reasonable consumers must and do rely on a company to honestly identify and describe the components and features of their products.

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[3] 5.2.1.

84. The value of the Product that plaintiff purchased was materially less than its value as represented by defendant.

85. Defendant sold more of the Product and at higher prices than it would have in the absence of this misconduct, resulting in additional profits at the expense of consumers.

86. Had Plaintiff and proposed class members known the truth, they would not have bought the Product or would have paid less for it.

87. The Product is sold for a price premium compared to other similar products, approximately than $4.49 per 500 mL, a higher price than it would otherwise be sold for, absent the misleading representations and omissions.

Jurisdiction and Venue

88. Jurisdiction is proper pursuant to Class Action Fairness Act of 2005 ("CAFA"). 28 U.S.C. § 1332(d)(2).

89. Upon information and belief, the aggregate amount in controversy exceeds $5 million, including any statutory damages, exclusive of interest and costs.

90. Plaintiff Bobby Phillips is a citizen of New York.

91. Defendant Johnson & Johnson Consumer Inc. is a New Jersey corporation with a principal place of business in Skillman, Somerset County, New Jersey.

92. The parties are citizens of different states.

93. Venue is proper because plaintiff resides in this district and a substantial portion of the events giving rise to the claims occurred in this district.

Parties

94. Plaintiff Bobby Phillips is a citizen of Bronx, Bronx County, New York.

95. Defendant Johnson & Johnson Consumer Inc., is a New Jersey corporation with a

principal place of business in Skillman, New Jersey, Somerset County.

96. Defendant is one of the largest manufacturers of oral care products in the world.

97. The Listerine brand was the first over-the-counter consumer mouthwash, and its yearly sales are over $1 billion.

98. snacks and cookies in the United States.

99. The Product is sold to consumers from retail and online stores of third-parties.

100. Plaintiff would not have purchased the Product, or would have paid less for it, if he knew the truth.

101. During the relevant statutes of limitations, plaintiff purchased the Product within her district and/or State for personal and household consumption and/or use in reliance on the representations of the Product.

102. Plaintiff purchased the Product on one or more occasions, during the relevant period, at stores including but not necessarily limited to, Rite Aid, 1510 St Nicholas Ave, New York, NY 10033, between May and June 2021, among other times.

103. Plaintiff bought the Product at or exceeding the above-referenced prices because he wanted a product that contained mostly or all natural ingredients, understood as being derived from natural raw materials and not made through processes understood to be artificial, including chemical reactions.

104. Plaintiff chose between Defendant's Product and other similar products which were represented similarly.

105. The Product was worth less than what Plaintiff paid and he would not have paid as much absent Defendant's false and misleading statements and omissions.

106. Plaintiff intends to, seeks to, and will purchase the Product again when he can do so

with the assurance that Product's representations are consistent with its composition.

Class Allegations

107. The class will consist of all New York residents who purchased the Product during the statutes of limitations for each cause of action alleged.

108. Common questions of law or fact predominate and include whether defendant's representations were and are misleading and if plaintiff and class members are entitled to damages.

109. Plaintiff's claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

110. Plaintiff is an adequate representative because his interests do not conflict with other members.

111. No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

112. Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

113. Plaintiff's counsel is competent and experienced in complex class action litigation and intends to protect class members' interests adequately and fairly.

114. Plaintiff seeks class-wide injunctive relief because the practices continue.

New York General Business Law ("GBL") §§ 349 & 350

(Consumer Protection Statute)

115. Plaintiff incorporates by reference all preceding paragraphs.

116. Plaintiff and class members desired to purchase a Product that contained mostly or exclusively natural ingredients and did not contain ingredients made through artificial processes.

117. Defendant's false and deceptive representations and omissions are material in that

they are likely to influence consumer purchasing decisions.

118. Defendant misrepresented the Product through statements, omissions, ambiguities, half-truths and/or actions.

119. Plaintiff relied on the representations.

120. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty, Implied Warranty of Merchantability and Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, *et seq.*

121. The Product was manufactured, marketed, and sold by defendant and expressly and impliedly warranted to plaintiff and class members that it contained mostly or exclusively natural ingredients and did not contain ingredients made through artificial processes.

122. Defendant had a duty to disclose and/or provide non-deceptive descriptions, and marketing of the Product.

123. This duty is based on Defendant's outsized role in the market for this type of Product.

124. Plaintiff provided or will provide notice to defendant, its agents, representatives, retailers, and their employees.

125. Defendant received notice and should have been aware of these issues due to complaints by regulators, competitors, and consumers, to its main offices.

126. The Product did not conform to its affirmations of fact and promises due to defendant's actions and were not merchantable because it was not fit to pass in the trade as advertised.

127. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Negligent Misrepresentation

128. Defendant had a duty to truthfully represent the Product, which it breached.

129. This duty is based on defendant's position, holding itself out as having special knowledge and experience this area.

130. The representations took advantage of consumers' cognitive shortcuts made at the point-of-sale and their trust in defendant.

131. Plaintiff and class members reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, their purchase of the Product.

132. Plaintiff and class members would not have purchased the Product or paid as much if the true facts had been known, suffering damages.

Fraud

133. Defendant misrepresented and/or omitted the attributes and qualities of the Product, that it contained mostly or exclusively natural ingredients and did not contain ingredients made through artificial processes.

134. Defendant's fraudulent intent is evinced by its knowledge that the Product was not consistent with its representations.

Unjust Enrichment

135. Defendant obtained benefits and monies because the Product was not as represented and expected, to the detriment and impoverishment of plaintiff and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

Plaintiff demands a jury trial on all issues.

WHEREFORE, Plaintiff prays for judgment:

1. Declaring this a proper class action, certifying plaintiff as representative and the undersigned as counsel for the class;
2. Entering preliminary and permanent injunctive relief by directing defendant to correct the challenged practices to comply with the law;
3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, and restitution and disgorgement for members of the class pursuant to the applicable laws;
4. Awarding monetary damages, statutory damages pursuant to any statutory claims and interest pursuant to the common law and other statutory claims;
5. Awarding costs and expenses, including reasonable fees for plaintiff's attorneys and experts; and
6. Other and further relief as the Court deems just and proper.

Dated: August 15, 2021

Respectfully submitted,

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